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# Federal and United States Jurisdiction under the Foreign Sovereign Immunities Act: *Verlinden B.V. v.* *Central Bank of Nigeria*

Gregory Stuart Smith

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## Federal and United States Jurisdiction Under the Foreign Sovereign Immunities Act: *Verlinden B.V. v. Central Bank of Nigeria*

In the Foreign Sovereign Immunities Act of 1976,<sup>1</sup> Congress granted federal courts original jurisdiction over disputes arising against foreign sovereigns not entitled to immunity.<sup>2</sup> In *Verlinden B.V. v. Central Bank of Nigeria*,<sup>3</sup> the United States Supreme Court unanimously held that the Act authorized even alien plaintiffs to sue foreign sovereigns in United States courts<sup>4</sup> and that the Act's grant of federal jurisdiction in these alien-foreign sovereign cases was a constitutional exercise of congressional power.<sup>5</sup> The Court thus reversed a controversial Second Circuit decision<sup>6</sup> which had held that this grant of federal jurisdiction was not within Congress' article III authority.

The *Verlinden* decision reaffirms the Supreme Court's commitment to a broad interpretation of the "arising under" clause of article III<sup>7</sup> and supports Congress' desire for uniformity in the interpretation of the law governing foreign sovereign immunity.<sup>8</sup> More importantly, *Verlinden* virtually assures exclusive federal jurisdiction in future cases against foreign sovereigns,<sup>9</sup> while providing checks against unnecessary litigation in American courts.<sup>10</sup>

The *Verlinden* case arose when Verlinden, a Dutch corporation, sued Nigeria's Central Bank in a New York federal district court for anticipa-

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<sup>1</sup> Pub. L. No. 94-583, 90 Stat. 2891 (1976), codified at 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-1611 (1976). For a syllabus of each of these provisions, see Note, *Federal Question Jurisdiction under the Foreign Sovereign Immunities Act: Verlinden B.V. v. Central Bank of Nigeria*, 17 WILLIAMETTE L.J. 275, 277 n.17 (1980). Pertinent provisions will be cited throughout the text.

<sup>2</sup> 28 U.S.C. §1330(a) (1976). See H.R. Rep. No. 1487, 94th Cong., 2d Sess. 12, reprinted in U.S. CODE CONG. & AD. NEWS 6604, 6610 [hereinafter cited as HOUSE REPORT]. The House and Senate Reports were identical.

<sup>3</sup> 103 S. Ct. 1962 (1983).

<sup>4</sup> *Id.* at 1973.

<sup>5</sup> *Id.*

<sup>6</sup> *Verlinden B.V. v. Central Bank of Nigeria*, 647 F.2d 320 (2d Cir. 1981), *rev'd*, 103 S. Ct. 1962 (1983).

<sup>7</sup> See Note, *Subject Matter Jurisdiction and the Foreign Sovereign Immunities Act of 1976*, 68 VA. L. REV. 893, 893 (1982) (Second Circuit's interpretation of "arising under" clause is overly restrictive).

<sup>8</sup> *Verlinden*, 103 S. Ct. at 1973 (Congress deliberately sought to channel cases interpreting sovereign immunity into federal courts to prevent multiplicity of conflicting interests).

<sup>9</sup> See *infra* notes 108-15 and accompanying text.

<sup>10</sup> See *infra* notes 116-42.

tory breach of an irrevocable letter of credit.<sup>11</sup> Neither side seriously disputed the fact that Nigeria's actions constituted an anticipatory breach, nor did they disagree that New York law governed the letter of credit.<sup>12</sup> Instead, Nigeria's "instrumentality"<sup>13</sup> argued that the Foreign Sovereign Immunities Act did not authorize alien-foreign sovereign suits in United States federal courts, that any such authorization was unconstitutional, and that Central Bank was entitled to sovereign immunity.<sup>14</sup> Thus, Nigeria challenged both the district court's federal jurisdiction (on statutory and constitutional grounds) and its United States jurisdiction (on sovereign immunity grounds) over the controversy.<sup>15</sup>

*Verlinden* essentially raised four questions which had not conclusively been resolved by American courts: (1) whether the Foreign Sovereign Immunities Act could constitutionally grant only restrictive immunity to foreign sovereigns which had originally enjoyed absolute immunity in America; (2) whether Congress in enacting the Act had authorized federal jurisdiction over alien-foreign sovereign suits; (3) whether such an authorization was constitutional; and (4) whether the standards governing sovereign immunity exempted Nigeria's Central Bank from

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<sup>11</sup> Nigeria had overordered cement from many suppliers, including *Verlinden*. The *Verlinden* transaction had been secured by an irrevocable letter of credit which Nigeria's Central Bank had established through Morgan Guaranty Bank in New York despite a clause in the contract requiring that it be established in Slavenberg's Bank in the Netherlands. *Verlinden B.V. v. Central Bank of Nigeria*, 488 F. Supp. 1284, 1287 (S.D.N.Y. 1980), *aff'd on other grounds*, 647 F.2d 320 (2d Cir. 1981), *rev'd*, 103 S. Ct. 1962 (1983). When Nigerian ports became bottlenecked with 260 ships carrying cement, and demurrage charges began to grow, Central Bank directed Morgan Guaranty to amend this and other letters of credit to pay only those suppliers who acquired approval from Nigeria. Rather than seeking such approval, which would inevitably entail renegotiation of the contract terms, *Verlinden* sued for anticipatory breach. 103 S. Ct. at 1965-66. For a more complete account of the facts giving rise to the suit, see *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 302-06 (2d Cir. 1981) (Nigeria's unilateral actions "took place on a scale previously unknown in international commerce").

<sup>12</sup> *Verlinden*, 488 F. Supp. at 1288. *Accord*, Comment, *Verlinden B.V. v. Central Bank of Nigeria: Federal Jurisdiction over Cases Between Aliens and Foreign States*, 82 COLUM. L. REV. 1057, 1059 n.13 (1982). In addition to the common law action for anticipatory breach of contract, Central Bank's actions were in violation of the Uniform Customs and Practices for Documentary Credits of the International Chamber of Commerce. *Verlinden*, 647 F.2d at 322 n.7; Note, *Federal Question Jurisdiction over Actions Brought by Aliens Against Foreign States*, 15 CORNELL INT'L L.J. 463, 464 (1982).

<sup>13</sup> *Verlinden*, 103 S. Ct. at 1965-66. An instrumentality or agency relationship exists when a foreign state (or one of its subdivisions) holds a majority interest in a separate legal body or treats that body as its organ. 28 U.S.C. 1603(b) (1976). Central Bank was undisputedly considered an "instrumentality" of Nigeria, thereby entitling it to the same treatment as the foreign state itself. See HOUSE REPORT, *supra* note 2, at 15-16 (central banks are specifically to be included as instrumentalities).

<sup>14</sup> *Verlinden*, 103 S. Ct. at 1966.

<sup>15</sup> Nigeria did not challenge United States jurisdiction on grounds other than sovereign immunity because alien-foreign sovereign suits had previously been allowed in state courts. See, e.g., *J. Zeevi & Sons v. Grindlays Bank*, 37 N.Y.2d 220, 333 N.E.2d 168, 371 N.Y.S.2d 892, *cert. denied*, 423 U.S. 866 (1975) (act of state defense rejected). For a discussion of the policy reasons for and against United States jurisdiction over alien-foreign sovereign suits, see *infra* notes 117-32 and accompanying text.

American jurisdiction. The courts found each question progressively more difficult to resolve.

The *Verlinden* courts had no trouble ruling that the restrictive theory of sovereign immunity was legitimate,<sup>16</sup> rubber-stamping a doctrine which had been practiced for over thirty years but only recently codified in the Foreign Sovereign Immunities Act.<sup>17</sup> The courts found that America's original grant of absolute immunity had been based in grace and comity rather than in the constitution.<sup>18</sup>

The second question was more difficult to resolve, although all three *Verlinden* courts eventually ruled that federal jurisdiction over alien-foreign sovereign suits was authorized by the Foreign Sovereign Immunities Act.<sup>19</sup> The courts examined both the legislative intent and the statutory language in making this determination. The district court and court of appeals both found the legislative intent somewhat unclear<sup>20</sup> but felt that the clear statutory language authorized federal jurisdiction: "The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state . . . with respect to which the foreign state is not entitled to immunity

. . . ."<sup>21</sup>

<sup>16</sup> *Verlinden*, 103 S. Ct. at 1967; *Verlinden*, 488 F. Supp. at 1291. The court of appeals did not address the question directly, probably assuming the validity of the restrictive theory to be settled law.

<sup>17</sup> See *infra* notes 75-82 and accompanying text.

<sup>18</sup> *Verlinden*, 103 S. Ct. at 1967. The theory of absolute immunity dates back to Chief Justice Marshall's decision in *The Schooner Exchange v. M'Faddon*, 12 U.S. (7 Cranch) 116 (1812). The Supreme Court's *Verlinden* decision seems clearly correct, given Marshall's recognition in *Schooner Exchange* of the potential for a restrictive immunity theory: "A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual [that jurisdiction is justified]." *Schooner Exchange* at 145. See Comment, *Problems "Arising Under" Verlinden B.V. v. Central Bank of Nigeria*, 31 AM. U.L. REV. 1039, 1044-47 (1982).

<sup>19</sup> *Verlinden*, 103 S. Ct. at 1969-70; *Verlinden*, 647 F.2d at 324; *Verlinden*, 488 F. Supp. at 1292-93. Prior to the Foreign Sovereign Immunities Act, federal jurisdiction over suits between aliens and foreign sovereigns existed only when the case was in admiralty or arose under another federal law. See Note, *Suits by Foreigners Against Foreign States in United States Courts: A Selective Expansion of Jurisdiction*, 90 YALE L.J. 1861, 1865-66 (1981).

<sup>20</sup> *Verlinden*, 647 F.2d at 323-24; *Verlinden*, 488 F. Supp. at 1291-92. While the legislative history clearly emphasized that the Act's primary purpose was to provide remedies for Americans against foreign sovereigns, and was not intended to open up American courts to all international claims, unqualified references to suits by "parties" against foreign states led the courts to conclude that "Congress formed no clear intent" on the matter. *Verlinden*, 647 F.2d at 324. But see 1 J. MOORE, J. LUCAS, H. FINK, D. HECKSTEIN & J. WICKER, *MOORE'S FEDERAL PRACTICE* ¶ 0.66[4] at 700.178-79 (2d ed. 1982) [hereinafter cited as *MOORE'S FEDERAL PRACTICE*] (Congress plainly intended to confer jurisdiction over alien-foreign sovereign suits on federal courts); *contra* Note, *supra* note 12, at 478-81 (Congress clearly did not intend to greatly expand jurisdiction with so little discussion). For a more detailed examination of the legislative history of the Foreign Sovereign Immunities Act, see generally Note, *supra* note 7, at 898-902. The courts' examination of legislative intent when the statutory language was clear has been criticized as unnecessary, Comment, *supra* note 12, at 1060 n.23. But see Note, *The Theory of Protective Jurisdiction*, 57 N.Y.U. L. REV. 933, 1007 (1982); Note, *supra* note 12, at 480 (legislative history provides insight into how statutory language should be constructed).

<sup>21</sup> 28 U.S.C. § 1330(a) (1976) (emphasis added). While allowing alien-foreign sovereign

The unanimous Supreme Court, in an opinion written by Chief Justice Burger, found that both the statutory language and the legislative history of the Foreign Sovereign Immunities Act clearly authorized federal jurisdiction over alien-foreign sovereign claims.<sup>22</sup> Although the Supreme Court's characterization of congressional intent as unambiguous has been criticized,<sup>23</sup> its general view of the Act as authorizing federal jurisdiction followed the majority view on the subject.<sup>24</sup>

The Foreign Sovereign Immunities Act's authorization of original federal jurisdiction over alien-foreign sovereign suits did not guarantee that federal courts could hear *Verlinden*, however. Federal jurisdiction must be premised upon both statutory and constitutional bases.<sup>25</sup> The third question, dealing with the constitutionality of the Act's grant of federal jurisdiction, was the most heated issue in the *Verlinden* decisions.

The district court in *Verlinden* first rejected article III's "diversity" clause as a constitutional basis for jurisdiction because of its specific references to citizens as parties,<sup>26</sup> a determination subsequently followed by

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suits marked a departure from past practice, Note, *Suing Foreign Sovereigns: A Procedural Compass*, 34 STAN. L. REV. 385, 389 (1982), § 1330 had specifically replaced a diversity jurisdiction statute which had limited federal court access to suits involving at least one United States citizen as a party. See Comment, *supra* note 12, at 1058 n.11. But see Note, *supra* note 12, at 480 (§ 1330 was repealed merely because Congress believed it redundant after the Foreign Sovereign Immunities Act, not because Congress wished to increase jurisdiction).

<sup>22</sup> *Verlinden*, 103 S. Ct. at 1969 ("[W]hen considered as a whole, the legislative history reveals an intent not to limit jurisdiction under the Act to actions brought by American citizens."). *Id.*

<sup>23</sup> Recent Developments, 24 VA. J. INT'L L. 201, 207 (1983).

<sup>24</sup> See Note, *supra* note 19, at 1866 ("courts generally have accepted the literal interpretation [of the Act's language] that it creates federal jurisdiction in foreigner-foreign state suits").

The best argument in favor of a construction of the legislative history of the Act as favoring federal jurisdiction over alien-foreign sovereign claims is based on a reading of the jurisdictional section in conjunction with the statute's automatic removal section, 28 U.S.C. 1441(d) (1976). As noted by the district court in *Verlinden*, Congress' intent in granting foreign sovereigns an automatic right to remove a case to federal court could not be fulfilled if the federal courts were not granted jurisdiction over these suits. *Verlinden*, 488 F. Supp. at 1292. See Comment, *supra* note 18, at 1042-43 (Foreign sovereign defendants seeking to remove might find federal courts had no jurisdiction, frustrating congressional intent behind the removal provision).

It has been argued, however, that the automatic removal right granted to foreign sovereigns was intended to apply only to suits brought against them by American citizens and residents. Note, *supra* note 12, at 479-80. This reasoning had been applied in *Santos Miranda v. Transportes Aereos Portugueses*, No. 78 C 2143 (N.D. Ill. Nov. 22, 1978), cited in Recent Developments, 16 TEX. INT'L L.J. 277, 282 (1981). Ostensibly this interpretation is consistent with the idea that the removal provision was passed to allow foreign sovereigns to remove cases from biased state courts and their jury trials, which are absent in federal courts. However, such a construction is "not as reasonable as . . . the *Verlinden*" interpretation, *id.* at 282, for it ignores the equally reasonable purpose in enacting the removal provision of promoting uniformity and ignores the plain language of the removal statute.

<sup>25</sup> *Verlinden*, 647 F.2d at 324-25 (citing *Kline v. Burke Construction Co.*, 260 U.S. 226, 234 (1922)).

<sup>26</sup> *Verlinden*, 488 F. Supp. at 1289. The diversity clause confers federal jurisdiction over "[c]ontroversies . . . between a State, or the Citizens thereof, and foreign States." U.S. CONST. art. III, § 2, cl. 1. The clause's distinction between "States" and "foreign States" prevents the former from being stretched to include the latter. The plaintiff in *Verlinden* conceded the fact that the diversity clause was inapplicable. *Verlinden*, 488 F. Supp. at 1289 n.6.

both appellate courts in *Verlinden*.<sup>27</sup> The issue thus became whether the federal jurisdictional grant under the Foreign Sovereign Immunities Act fell within the "arising under" clause of article III.<sup>28</sup> The district court held that the issue of sovereign immunity which was raised in *Verlinden* constituted a federal question sufficient for the case to arise under a federal law as required by article III.<sup>29</sup>

The Second Circuit Court of Appeals disagreed, finding the Act's jurisdictional grant unconstitutional. Writing for a unanimous panel of three, Judge Kaufman found that neither precedent nor the structure of article III supported constitutional federal jurisdiction over alien-foreign sovereign claims.<sup>30</sup> Finally, the court rejected bases of constitutionality grounded outside of article III.<sup>31</sup>

The Second Circuit first found that the precedent of article III would not support federal jurisdiction. The court of appeals agreed with the district court that foreign sovereign immunity was a federal question.<sup>32</sup> The appellate court disagreed, however, that all federal questions are sufficient to constitutionally support federal jurisdiction. Because article III's "arising under" clause had rarely been interpreted since the 1875 adoption of the statutory "arising under" clause,<sup>33</sup> the court first analogized the constitutional provision to its statutory counterpart, utilizing the considerable precedent interpreting the latter.<sup>34</sup> The court then found that jurisdiction would not be authorized under the statute, as the federal question of sovereign immunity arose only as a defense to state action in *Verlinden*.<sup>35</sup> Federal questions arising in defense were insufficient to support federal jurisdiction under the statute's "well-pleaded complaint" rule, which allows federal subject matter jurisdiction only

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<sup>27</sup> *Verlinden*, 103 S. Ct. at 1970; *Verlinden*, 647 F.2d at 325.

<sup>28</sup> The constitutional "arising under" clause provides, "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." U.S. CONST., art III, § 2, cl. 1.

<sup>29</sup> *Verlinden*, 488 F. Supp. at 1292-93.

<sup>30</sup> See *infra* notes 32-41 and accompanying text.

<sup>31</sup> See *infra* notes 42-43 and accompanying text.

<sup>32</sup> *Verlinden*, 647 F.2d at 326 (questions of sovereign immunity are wholly federal).

<sup>33</sup> *Id.* at 325. In most cases, federal jurisdiction is asserted as "arising under" another federal law and § 1331 is used to support Congress' approval of federal jurisdiction: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Act of Mar. 3, 1875, ch. 137 § 1, 18 Stat. 470, *codified at* 28 U.S.C. § 1331 (1976). Because article III is by necessity at least as broad as § 1331 (otherwise § 1331 would be unconstitutional), any case arising under the statutory congressional grant of jurisdiction automatically arose under the constitutional grant, and direct interpretation of the latter was unnecessary.

<sup>34</sup> *Verlinden*, 647 F.2d at 325.

<sup>35</sup> *Id.* at 326 n.20 and accompanying text. The legislative history of the Foreign Sovereign Immunities Act is fairly clear in retaining sovereign immunity as an affirmative defense. Case Digest, 8 BROOKLYN J. INT'L L. 523, 527-28 n.21 and accompanying text. *But see* Note, *The Protective Jurisdiction of the Federal Courts*, 30 UCLA L. REV. 542, 556 n.81 (sovereign immunity can be viewed as "an essential element of plaintiff's claim because the federal statute assumes that the claim would have been barred . . . had the law not eliminated the sovereign immunity defense").

when the federal question appears "on the face of a well-pleaded complaint and . . . not in anticipation of a defense."<sup>36</sup>

The court of appeals then turned to article III itself, examining whether the scope of the constitutional "arising under" clause went beyond its statutory counterpart.<sup>37</sup> Examining the pre-1875 cases which had interpreted article III itself, the Second Circuit determined that the bulk of precedent precluded federal jurisdiction and that cases to the contrary could be reconciled on other grounds.<sup>38</sup>

Beyond precedent, the Second Circuit in *Verlinden* argued that the structure of article III's "arising under" clause mandated a denial of federal jurisdiction in *Verlinden*. The court reasoned that federal jurisdiction can be premised upon a question which arises under a federal law, but not under a federal law which is purely jurisdictional. If a federal question could arise from application of federal jurisdictional statutes, every congressional grant of jurisdiction would constitutionally "arise under" a federal statute by arising under itself, and the "constitutional diversity grant would then be surplusage."<sup>39</sup> The court thus determined that cases must arise under substantive federal law to support federal jurisdiction.<sup>40</sup> Because the Foreign Sovereign Immunities Act regulated only "judicial practice" rather than "regulat[ing] conduct and creat[ing] rights outside the courtroom," the Second Circuit found federal jurisdiction lacking.<sup>41</sup>

Finally, the Second Circuit examined the possibility of federal jurisdiction being constitutionally authorized by provisions other than article III. The court recognized the possible validity of a "protective jurisdiction" theory authorizing federal jurisdiction over areas of important national concern even when the requirements of article III were not met.<sup>42</sup> The court did not feel, however, that the national interest in *Verlinden* was vital enough to remove it from article III's restrictions.<sup>43</sup>

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<sup>36</sup> Section 1331 grants federal jurisdiction when (1) a suit arises under the law that creates the cause of action, (2) the plaintiff's complaint discloses a need to interpret a federal law, or (3) federal common law preempts the state law that would otherwise govern the case. Because only the second was at issue in *Verlinden*, the well-pleaded complaint rule was examined. For a cogent description of the development of the rule, see Note, *supra* note 12, at 468-69.

The well-pleaded complaint rule has frequently been criticized. See Articles and Notes cited in Comment, *supra* note 18, at 1058-59 nn.141-43 ("As recently as 1969, the American Law Institute recommended that removal jurisdiction be allowed if a federal defense were interposed"). Others have argued that the rule should not be abandoned but rather revised and liberally applied in cases with foreign parties. See MOORE'S FEDERAL PRACTICE, *supra* note 20, at ¶ 0.66[4].

<sup>37</sup> *Verlinden*, 647 F.2d at 327-28 ("The Supreme Court has implied, but has never held, that § 1331 occupies less than all of the ground staked out by the parallel phrase in Article III").

<sup>38</sup> See *infra* notes 83-102 and accompanying text.

<sup>39</sup> *Verlinden*, 647 F.2d at 329. See Note, *supra* note 7, at 896 (pointing out how federal jurisdiction premised on a jurisdictional statute is circular reasoning).

<sup>40</sup> *Verlinden*, 647 F.2d at 329.

<sup>41</sup> *Id.* at 327.

<sup>42</sup> *Id.* at 328-29.

<sup>43</sup> *Id.* at 329.

With one notable exception,<sup>44</sup> the commentators consistently called for the reversal of the Second Circuit's constitutional decision in *Verlinden*.<sup>45</sup> Critics began by rejecting the Second Circuit's article III precedent argument. Noting that the Supreme Court had never limited its interpretations of the article III "arising under" clause to its statutory counterpart's precedent,<sup>46</sup> the commentators disagreed with the court of appeals' application of the "well-pleaded complaint" rule<sup>47</sup> and its analysis of pre-1875 interpretations of the constitutional "arising under" clause.<sup>48</sup> The critics also rejected the Second Circuit's article III structural argument. Although most agreed with the court of appeals' theory that federal jurisdiction cannot be premised solely on a purely jurisdictional statute,<sup>49</sup> the writers rejected the court's determination that the Foreign Sovereign Immunities Act, by regulating conduct within the courtroom, was therefore purely jurisdictional, noting that some procedural issues are nonjurisdictional<sup>50</sup> and that the distinction between the conclusory labels "structural" and "procedural" is illusory.<sup>51</sup> The commentators also found the Second Circuit's protective jurisdictional analysis inadequate. Critics noted that a federal question is also necessary for United States Supreme Court review of state court decisions.<sup>52</sup> Thus, the

<sup>44</sup> Note, *supra* note 12. See also Recent Cases, 13 J. MARITIME L. & COM. 105, 110 (1981) (approving without discussion the merits of the Second Circuit's *Verlinden* discussion).

<sup>45</sup> See, e.g., Note, *Defaults & Remedies Under International Bank Loan Agreements with Foreign Sovereign Borrowers—A New York Lawyer's Perspective*, 1982 U. ILL. L. REV. 89, 123-24 (Second Circuit decision in *Verlinden* seems wrong; Supreme Court will hopefully reverse).

<sup>46</sup> See cases and articles cited in Comment, *supra* note 18, at 1042 n.19 (Supreme Court has "repeatedly" asserted that article III is broader than § 1331). See also materials cited in Note, *supra* note 12 at 469 n.46.

<sup>47</sup> See Comment, *supra* note 18, at 1055-56; Note, *supra* note 7, at 893. But see Case Digest, *supra* note 35, at 528 n.22; Note, *supra* note 35, at 556 n.81 (well-pleaded complaint rule should apply, although both commentators urge reversal of Second Circuit *Verlinden* decision on other grounds).

<sup>48</sup> See, e.g., Comment, *supra* note 18, at 1052-55; Note, *supra* note 19, at 1866-68; Note, *supra* note 7, at 904-06.

<sup>49</sup> For a good description of the theories in favor of and against a federal question being able to arise under a purely jurisdictional statute, see Note, *supra* note 12, at 473-78. The two major proponents of the minority view are Professor Mishkin, who would allow a purely jurisdictional statute to support federal jurisdiction when Congress had an "articulated, active policy" interest, and Professor Wechsler, who would allow any jurisdictional statute to support jurisdiction. *Id.* The majority view, however, is that only nonjurisdictional federal questions can support federal jurisdiction, see *supra* note 39 and accompanying text, although some have described this restriction as the *only* constitutional limitation on "arising under" jurisdiction. Note, *supra* note 7, at 896.

<sup>50</sup> See, e.g., Comment, *supra* note 18, at 1060-61 (fact that sovereign immunities provisions are binding on states proves Act is not purely jurisdictional); Note, *supra* note 21, at 391 (Act's banishment of punitive damages proves it to be substantive); Recent Developments, *supra* note 23, at 213 n.60 (Second Circuit's failure to examine § 1330's express cross references to the substantive immunity provisions of the Act was an "unfathomable oversight"). But see Note, *supra* note 12, at 470-73 (Second Circuit was correct in finding § 1330 to be purely jurisdictional notwithstanding Act's impact on state courts regarding immunity and punitive damages; however, the Act could become substantive if Congress incorporated state substantive law).

<sup>51</sup> Comment, *supra* note 12, at 1063-64 (advocating functional approach).

<sup>52</sup> "[T]he [Supreme] Court cannot review state judgments not presenting a federal question," Note, *supra* note 7, at 918.



Second Circuit's *Verlinden* decision denying original jurisdiction to federal courts would mean that the United States jurisdictional issue of sovereign immunity would be determined solely, and perhaps inconsistently, by fifty-one jurisdictions independent of federal review.<sup>53</sup> Because federal supremacy over foreign policy was at issue, federal jurisdiction should be "stretched" to protect it, even if the article III requirements technically were not met.<sup>54</sup> Finally, a number of critics argued that deciding the constitutionality of the federal jurisdictional question before deciding the statutory question of United States jurisdiction (sovereign immunity) was contrary to the presumption against unconstitutional construction.<sup>55</sup>

Following the majority of the critics, the Supreme Court unanimously reversed the Second Circuit's *Verlinden* decision. The Court found the lower court's reliance on the statutory "arising under" clause and its "well-pleaded complaint" rule unwarranted<sup>56</sup> and disagreed with the Second Circuit's interpretation of precedent.<sup>57</sup> While admitting the validity of the Second Circuit's structural argument that a federal question cannot arise from the application of a federal jurisdictional statute,<sup>58</sup> the Court disagreed with the lower court's interpretation of the Foreign Sovereign Immunities Act as "purely jurisdictional."<sup>59</sup> Finding constitutional authorization under article III's "arising under" clause, the Court found it unnecessary to decide the validity of the "protective jurisdiction" theory,<sup>60</sup> disappointing those critics who had thought *Verlin-*

<sup>53</sup> See, e.g., *id.*; Comment, *supra* note 12, at 1064. One commentator also noted that the Second Circuit's *Verlinden* decision may have rendered the *general* Supreme Court review statute constitutionally suspect, as that statute grants the Supreme Court certiorari powers over federal questions even when they arose as a defense. Comment, *supra* note 18, at 1057.

<sup>54</sup> Note, *supra* note 20, at 1007; Comment, *supra* note 12, at 1065-66.

<sup>55</sup> Case Digest, *supra* note 35, at 529; Recent Developments, *supra* note 23, at 210 n.47. See also Note, *supra* note 12, at 465 n.22, 480-81 (using the presumption against unconstitutional construction to argue for a restrictive reading of the statutory "arising under" clause).

One commentator has also noted that the Second Circuit's ruling on the constitutional issue may have been unlawful when combined with the court's refusal to allow the United States to intervene to defend the statute's constitutionality. Comment, *supra* note 18, at 1041 n.14. The Supreme Court did not mention this alleged violation in its opinion, although it did allow the government to intervene. Note, *supra* note 45, at 256 n.26 (United States filed brief in Supreme Court on *Verlinden* case).

<sup>56</sup> *Verlinden*, 103 S. Ct. at 1972. The Court did not discuss the Second Circuit's classification of sovereign immunity as a defense but instead objected to the very use of § 1331 and its well-pleaded complaint rule as analogous precedent.

<sup>57</sup> See *infra* notes 103-06 and accompanying text.

<sup>58</sup> *Verlinden*, 103 S. Ct. at 1972-73.

<sup>59</sup> *Id.* at 1973. The Court found that the "primary purpose" of the Foreign Sovereign Immunities Act was to establish comprehensive rules governing sovereign immunity. The fact that section 1330(a) was labeled as jurisdictional did not deny its purpose of regulating foreign sovereign immunities law.

<sup>60</sup> *Id.* at 1970 n.17. Despite the Court's hesitancy to rule on the "protective jurisdiction" issue, it noted that Congress had "exercised its article I powers," *id.* at 1971 & n.19, in "enact[ing] a broad statutory framework governing assertions of foreign sovereign immunity," *id.* at 1973, an area in which the "primacy of national concerns is evident."

den ideally suited to its establishment.<sup>61</sup>

The fourth issue in *Verlinden*, whether United States jurisdiction existed over Nigeria's Central Bank due to a lack of sovereign immunity, is perhaps the most difficult to resolve and potentially the most far-reaching.<sup>62</sup> The district court found that Nigeria's Central Bank had neither explicitly nor implicitly waived its sovereign immunity in America by agreeing to arbitration in France<sup>63</sup> and that personal jurisdiction was therefore lacking.<sup>64</sup> The court of appeals in *Verlinden* ruled its federal jurisdiction unconstitutional and therefore did not address the immunity/United States jurisdictional issue in *Verlinden*,<sup>65</sup> although dicta in related cases which it decided the same day may call the district court decision into question.<sup>66</sup> The Supreme Court similarly ruled only on the federal jurisdictional issue, remanding *Verlinden* to the Second Circuit to review the United States jurisdictional issue of sovereign immunity.<sup>67</sup> The Court first addressed the argument that permitting aliens to sue foreign sovereigns in American courts would cause them to be "turned into small 'international courts of claims,'"<sup>68</sup> an eventuality Congress sought to avoid.<sup>69</sup> The Court correctly noted that the Foreign Sovereign Immunities Act protected against a flood of foreign suits, not by limiting the parties, but through substantive provisions requiring "substantial contact with the United States."<sup>70</sup> The Court also implied that forum non conveniens should be used when necessary to restrict foreign access to American courts, even when jurisdiction could legitimately be asserted over the

<sup>61</sup> Note, *supra* note 20, at 1014 (suggesting that the protective jurisdiction theory be adopted on the grounds listed in note 60). The Court's failure to adopt the theory is typical, *id.* at 937 (majority of Supreme Court has never expressly adopted the theory), although perhaps not surprising, *id.* at 938 (*Verlinden* may be an "awkward" case in which to establish the theory). But see Comment, *supra* note 18, at 1065 (*Verlinden* is ideally suited to establishment of protective jurisdiction theory).

<sup>62</sup> Recent Development, *supra* note 23, at 211-12. See also *infra* notes 116-43 and accompanying text.

<sup>63</sup> *Verlinden*, 488 F. Supp. at 1300-02. Nigeria had agreed to the arbitration of the International Chamber of Commerce in Paris, France, *id.* at 1300, raising the question of whether it had implicitly waived its immunity in other jurisdictions as well. For a description of the types of sovereign commercial activities which can lead to waiver of immunity, see Clarke, *The Foreign Sovereign Immunities Act of 1976*, 3 N.C.J. INT'L L. & COM. REG. 206, 218-19 (1978).

<sup>64</sup> *Verlinden*, 488 F. Supp. at 1302. The district court should have found that it lacked subject matter jurisdiction as well, for neither type of United States jurisdiction exists when the sovereign defendant is immune. See *Verlinden*, 103 S. Ct. at 1967 n.5.

<sup>65</sup> *Verlinden*, 103 S. Ct. at 1973-74 (describing court of appeals' restraint).

<sup>66</sup> See Note, *supra* note 12, at 466 n.22 (three of four factors which persuaded Second Circuit that minimum contacts existed in related cases also exist in *Verlinden*). See also Note, *supra* note 45, at 115 n.124 and accompanying text ("direct effect" on United States exists in *Verlinden*, satisfying the minimum contacts necessary for personal jurisdiction); but see Case Digest, *supra* note 35, at 533 ("direct effects" and minimum contacts lacking in *Verlinden*).

<sup>67</sup> *Verlinden*, 103 S. Ct. at 1974.

<sup>68</sup> *Id.* at 1969.

<sup>69</sup> Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 94th Cong., 2d Sess. 31 (1976) (statement of Bruno A. Ristan, Chief, Foreign Litigations Section, Civil Division, Department of Justice), cited in *Verlinden*, 103 S. Ct. at 1969-70.

<sup>70</sup> *Verlinden*, 103 S. Ct. at 1970.

foreign sovereign.<sup>71</sup> Unfortunately, however, the Supreme Court's notes in *Verlinden* did not establish the well-defined standards which are needed in this politically volatile area.

The current uncertainty is unfortunate, and perhaps even surprising, given the length of the debate and the seemingly unanimous call for uniformity in the law governing claims against foreign sovereigns. The dispute over federal jurisdiction over foreign parties dates back to the earliest stages of American history. Early drafts of article III had included references to "all cases in which foreigners may be interested."<sup>72</sup> Article III as eventually adopted, however, specifically required "citizens" as one of the parties in its diversity clause.<sup>73</sup> The "arising under" clause thus became the only possible source of federal jurisdiction over suits between foreigners.<sup>74</sup>

Unfortunately, for purposes of precedent, foreign sovereigns long enjoyed absolute immunity in United States courts.<sup>75</sup> Thus, while the federal government was no doubt interested in the foreign policy implications of suits against foreign sovereigns in American courts, no federal statute was necessary to protect these sovereigns. Courts dismissed such suits on absolute immunity grounds, never examining whether a federal statute could have constitutionally supported United States or federal jurisdiction under the "arising under" clause in the absence of such immunity.<sup>76</sup>

In 1952, however, the State Department announced its adoption of the restrictive theory of foreign sovereign immunity,<sup>77</sup> which limits immunity to a sovereign's public acts.<sup>78</sup> For many years, the courts de-

<sup>71</sup> *Id.* at 1970 n.15.

<sup>72</sup> *See Verlinden*, 647 F.2d at 328 n.23.

<sup>73</sup> *See supra* note 26.

<sup>74</sup> *See supra* note 28.

<sup>75</sup> *See supra* notes 16-18 and accompanying text.

<sup>76</sup> *See, e.g.*, cases cited *infra* notes 83-87. Only those cases between non-sovereign aliens examined federal jurisdictional powers, as others were dismissed on absolute immunity grounds. The greater federal interest in regulating jurisdiction over suits against foreign sovereigns was thus not addressed.

<sup>77</sup> The announcement of the adoption of the theory of restrictive sovereign immunity was made in what has come to be known as the "Tate Letter," Letter from Jack B. Tate, Acting Legal Advisor to the Department of State, to Phillip Perlman, Acting Attorney General, May 19, 1952, reprinted in 26 DEP'T OF STATE BULL. 984 (1952). For a discussion of the Tate Letter and the problems persisting after its general acceptance, see Clarke, *supra* note 63, at 211-14.

<sup>78</sup> *See Note, supra* note 1, at 275. A foreign sovereign is thus not immune from the consequences of its private acts, the most important of which are its commercial activities, for which it is liable under 28 U.S.C. § 1605(a)(2) (1976). *See Dellapenna, Suing Foreign Governments and Their Corporations: Sovereign Immunity* (pt. 2), 85 COLUM. L.J. 228, 230 (1980). While the question of what distinguishes a commercial act is not always clear, *id.* at 232-33, the distinction depends on the "nature" of the act rather than its "purpose." 28 U.S.C. § 1603(e) (1976).

Foreign sovereigns may also be sued when their immunity has been waived either explicitly (by contact or treaty) or implicitly (by submitting to arbitration). *Id.* § 1605(a)(1). Sovereign immunity may also be invalid as a defense against claims for recovery of property taken in violation of international law, *id.* § 1605(a)(3); against noncommercial torts claims, *id.* § 1605(a)(5); against admiralty claims, *id.* § 1605(b); and against certain counterclaims, *id.* § 1607. *See generally* Clarke, *supra* note 63, at 215-23.

ferred to State Department determinations as to which sovereign acts were entitled to immunity.<sup>79</sup> A desire to base these determinations on consistent legal grounds rather than diplomatic and political case-by-case considerations, however, caused Congress to codify the restrictive theory in the Foreign Sovereign Immunities Act of 1976.<sup>80</sup> Contained in the Act was a provision granting federal courts original jurisdiction over all claims in which foreign sovereigns lack immunity.<sup>81</sup> The provision is part of a comprehensive scheme designed by Congress to enhance uniformity in the law governing sovereign immunity.<sup>82</sup>

Because the Foreign Sovereign Immunities Act *directly* conferred jurisdiction over foreign sovereigns to the federal courts,<sup>83</sup> it required courts to examine the constitutional "arising under" clause distinctly from the statutory clause which had been the source of the bulk of "arising under" interpretation.<sup>84</sup> Direct interpretation of the constitutional clause was rare and old. Early decisions had rejected congressionally authorized federal jurisdiction over suits between aliens without even discussing the "arising under" clause.<sup>85</sup> Perhaps most notable was *Mossman v. Higginson*, examining Section eleven of the Judicial Act of 1789, which conferred federal jurisdiction in any case "where . . . an alien is a party."<sup>86</sup> In *Mossman*, the United States Supreme Court rejected this grant of federal jurisdiction as inconsistent with the diversity clause and did not even examine the "arising under" possibilities.<sup>87</sup>

The leading case directly interpreting the "arising under" clause of article III was *Osborn v. Bank of the United States*.<sup>88</sup> *Osborn* arose when the newly-created federal bank sued in federal court to enjoin the collection of Ohio's state tax against it. Federal jurisdiction had been authorized under the congressional statute creating the bank to protect it from hos-

<sup>79</sup> See *Verlinden*, 103 S. Ct. at 1968.

<sup>80</sup> *Id.* Placing the burden on courts to determine questions of sovereign immunity solely on legal grounds ensured that individuals would not be "denied a remedy in order to further the foreign policy goals of a particular administration." Clarke, *supra* note 63, at 232.

<sup>81</sup> *Verlinden*, 103 S. Ct. at 1969.

<sup>82</sup> For a description of related parts of the Immunities Act also designed to enhance uniformity, see Comment, *supra* note 12, at 1059 n.13. See generally von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33 (1978); Weber, *The Foreign Sovereign Immunities Act of 1976: Its Origin, Meaning and Effect*, 3 YALE STUD. WORLD PUB. ORD. 1 (1976); Note, *Limits of Jurisdictional Control — The Foreign Sovereign Immunities Act of 1976*, 18 HARV. INT'L L.J. 429 (1977).

<sup>83</sup> See *supra* note 33.

<sup>84</sup> See *supra* notes 33-34 and accompanying text.

<sup>85</sup> *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851); *Hodgson v. Bowerbank*, 9 U.S. (4 Cranch) 303 (1809); *Montalet v. Murray*, 8 U.S. (4 Cranch) 46 (1807); *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12 (1800).

<sup>86</sup> 4 U.S. (4 Dall.) 12, 14 (1800).

<sup>87</sup> *Id.* The Supreme Court did not strike down the statute despite its declared unconstitutionality, however, as the case predated *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

<sup>88</sup> 22 U.S. (9 Wheat.) 738 (1824) (dicta). The *Osborn* dicta was made holding in *Bank of the United States v. Planters' Bank of Georgia*, 22 U.S. (9 Wheat.) 398 (1824). The first major Supreme Court case to examine the "arising under" clause of article III was *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821). See Note, *supra* note 7, at 904-05.

tile state courts.<sup>89</sup> Despite the fact that federal immunity would have arisen as a *defense* to the state claim,<sup>90</sup> the United States Supreme Court, and Chief Justice Marshall, found the grant of original jurisdiction constitutional: "[I]t is a sufficient foundation for jurisdiction, that the title or right set up by the party, may be defeated by one construction of the constitution or laws of the United States, and sustained by the opposite construction."<sup>91</sup>

*Osborn* was criticized for the breadth of its dicta in allowing federal jurisdiction. Critics argued that the language, taken to its extreme, could condone the "assertion of original federal jurisdiction on the remote possibility of presentation of a federal question."<sup>92</sup> Consequently, interpretation of the 1875 statutory "arising under" clause did not follow *Osborn* by analogy, despite the statute's similarity to the constitutional language interpreted by *Osborn*.<sup>93</sup> The most notable deviation was the interpretation of the statute as requiring the federal question to be disclosed on the face of what would be a well-pleaded complaint in order for federal jurisdiction to be justified.<sup>94</sup> Thus, the federal question which arose as a defense in *Osborn* and which was found to justify federal jurisdiction, would be rejected as supporting federal jurisdiction today under the statutory "arising under" clause and its "well-pleaded complaint" rule.

Some question remained, however, as to whether *Osborn* remained good law on the constitutional "arising under" clause.<sup>95</sup> The problems in *practice* of applying broad statutory federal jurisdiction noted by *Osborn*'s critics now seemed distinguishable from the *theoretical* benefits of reserving broad federal jurisdictional powers in the constitution in the event they would someday be needed.<sup>96</sup>

Despite this possible distinction, the Second Circuit in *Verlinden* found the earliest cases to be controlling in interpreting the constitutional "arising under" clause. The Second Circuit placed particular emphasis on *Mossman*, in which "the Supreme Court found that the judicial power did not extend to a suit between two aliens, even where the statute conferred it."<sup>97</sup> Despite the fact that *Mossman* and the other cases had

<sup>89</sup> *Osborn*, 22 U.S. (9 Wheat.) at 817.

<sup>90</sup> *Id.* at 824.

<sup>91</sup> *Id.* at 822 (quoted in *Verlinden*, 103 S. Ct. at 1971).

<sup>92</sup> *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957) (Frankfurter, J., dissenting). Frankfurter's remarks mirror those of other critics dating back to Justice Jackson's dissent in *Osborn*, in which Jackson feared the expansion of federal jurisdiction which would result from jurisdiction over suits that *might* arise under United States law. *Osborn*, 22 U.S. (9 Wheat.) at 889 (Jackson, J., dissenting). See also Comment, *supra* note 18, at 1052-53.

<sup>93</sup> Compare the language contained in article III, *supra* note 28, with that in § 1331, *supra* note 33.

<sup>94</sup> See *supra* note 36 and accompanying text.

<sup>95</sup> See, e.g., Note, *supra* note 7, at 906.

<sup>96</sup> See Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 162 (1953) (broad interpretation of article III is necessary to protect future federal interests which are currently unforeseeable).

<sup>97</sup> *Verlinden*, 647 F.2d at 328.

not specifically discussed the "arising under" clause of article III,<sup>98</sup> the *Verlinden* court of appeals felt that the Supreme Court in those cases had, by implication, "necessarily held" it inapplicable by negating the congressional grants of federal jurisdiction.<sup>99</sup>

The Second Circuit attempted to limit the contrary dicta in *Osborn* by noting its critics<sup>100</sup> and limiting the case to its facts. "The Supreme Court, faced [in *Osborn*] with the death of the [B]ank [of the United States] . . . on the one hand and with stretching jurisdictional concepts on the other, saved the Bank."<sup>101</sup> *Osborn*'s dicta thus should not apply to *Verlinden*, in which the supremacy of the federal government was not a serious issue.<sup>102</sup>

The Supreme Court in *Verlinden* brushed aside *Mossman* and the other cases relied upon by the Second Circuit, stating that those cases applied article III's constitutional limits to statutes which did "nothing more than grant jurisdiction."<sup>103</sup> The Court then found *Osborn*, which permitted federal jurisdiction over a claim supported by any reasonable construction of the constitution or non-jurisdictional federal laws,<sup>104</sup> to be controlling. Because the Foreign Sovereign Immunities Act was more than a mere jurisdictional statute,<sup>105</sup> and because at least one reasonable construction of the Act gave rise to a federal question,<sup>106</sup> *Verlinden* was found to "arise under" a federal law for purposes of the *Osborn* constitutional test.<sup>107</sup> The Court thus reaffirmed its commitment to a broad interpretation of the constitutional "arising under" clause and retained the

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.* Federal jurisdiction may still be lacking over suits between two aliens when neither is a foreign sovereign. See Comment, *supra* note 18, at 1041 n.15, citing *Edlow Int'l Co. v. Nuklearna Elektrarna Krsko*, 441 F. Supp. 827 (D.D.C. 1977) (Foreign Sovereign Immunities Act does not authorize federal jurisdiction over alien-alien suits; constitutional question not addressed).

<sup>100</sup> *Verlinden*, 647 F.2d at 329. See also *supra* note 92.

<sup>101</sup> *Verlinden*, 647 F.2d at 329.

<sup>102</sup> *Id.* at 329-30 (refusing to extend *Osborn* to cases in which the United States is not a party).

<sup>103</sup> *Id.* at 1973. Because the statutes were purely jurisdictional, they could not constitute federal questions sufficient to meet the requirements of the "arising under" clause. See *supra* note 39 and accompanying text. The Supreme Court's conclusion that any federal concern over aliens in *Mossman* was limited to jurisdictional matters seems supported by the *Mossman* Court's statement that "[n]either the constitution, nor the act of congress, regard, on this point, the subject of the suit, but the parties." *Mossman*, 4 U.S. (4 Dall.) at 14 (emphasis added). Sovereign immunity was not at issue in *Mossman* because the immunity issue was considered settled at that time (sovereigns were absolutely immune).

<sup>104</sup> *Osborn*, 22 U.S. (9 Wheat.) at 822.

<sup>105</sup> The Court found that the primary purpose of the Foreign Sovereign Immunities Act was to establish comprehensive rules governing sovereign immunity. *Verlinden*, 103 S. Ct. at 1973. The fact that § 1330(a) was labeled as jurisdictional did not deny its purpose of regulating foreign sovereign immunities law. *Id.* See Note, *supra* note 7, at 911.

<sup>106</sup> The Court ruled that questions arising under any non-jurisdictional statute — even statutes regulating areas within the courtroom such as the immunity of the parties — were substantive enough to constitute federal issues for article III purposes.

<sup>107</sup> The Supreme Court in *Verlinden* recognized that the breadth of *Osborn*'s conclusion had been questioned. See *supra* note 92. But because the Court felt that the issue of sovereign immunity raised more than a "remote possibility" of a federal question in *Verlinden*, the Court avoided

federal original and appellate jurisdiction necessary for a consistent application of the law governing foreign sovereign immunity.

The Supreme Court's *Verlinden* decision allowed the alien plaintiff Verlinden to sue Nigeria's instrumentality in United States federal courts for its acts which were not subject to sovereign immunity — despite the fact that alternate forums existed in United States state courts and in international tribunals. While allowing national forum shopping appears to support the congressional purposes behind enactment of the Foreign Sovereign Immunities Act, the prospect of international forum shopping is more troublesome.

In the Foreign Sovereign Immunities Act, Congress specifically intended to encourage federal jurisdiction in order to promote clarity in the law governing foreign sovereigns.<sup>108</sup> The Supreme Court's decision in *Verlinden* not only permits federal jurisdiction in theory, but also virtually assures *exclusive* federal jurisdiction in practice.

The Court expressly stated that it “need not consider [whether] petitioner's claim that [the Foreign Sovereign Immunities Act] . . . renders every claim against a foreign sovereign a federal cause of action.”<sup>109</sup> However, it is difficult to conceive of a situation in which a federal question would not arise, and the Court itself went on to state that “every action against a foreign sovereign necessarily involves application of a body of substantive federal law.”<sup>110</sup>

The logical progression from this *possible* federal jurisdiction in every case to *exclusive* jurisdiction by federal courts is a short one. The consistent body of immunity law which will be developed in federal courts will necessarily support either the plaintiff's position, prompting the claim to be filed in federal court under the original jurisdiction provision, or the defendant's position, prompting the claim's removal under the Foreign Sovereign Immunities Act's automatic removal provision.<sup>111</sup> Even before a uniform standard of immunity develops, it seems likely that one of the parties will wish to take advantage of the federal courts' greater familiarity with, and sensitivity to, the sovereign immunities law.<sup>112</sup> In

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delineating the jurisdictional boundaries of article III under the *Osborn* test. *Verlinden*, 103 S. Ct. at 1971.

<sup>108</sup> See *id.* at 1973. Because alien-foreign sovereign actions were previously allowed in *J. Zeevi & Sons v. Grindlays Bank*, 37 N.Y.2d 220, 333 N.E.2d 168, 371 N.Y.S.2d 892, *cert. denied*, 423 U.S. 866 (1975), the Foreign Sovereign Immunities Act allowed alien plaintiffs to bring suits against foreign sovereigns in either state or federal courts. It is unclear why Congress did not preclude state jurisdiction over foreign sovereign issues if indeed Congress' chief goal was consistency. Note, *supra* note 21, at 388 n.19. It has been suggested that state jurisdiction has been implicitly prohibited by the Act because state jurisdiction now “intrude[s]” upon a federal area. See Comment, *supra* note 12, at 1070-71. In examining the practical effects of the Act, however, state jurisdiction will be assumed *arguendo* to be valid and state-federal forum shopping to be available.

<sup>109</sup> *Verlinden*, 103 S. Ct. at 1972 n.22.

<sup>110</sup> *Id.* at 1973.

<sup>111</sup> 28 U.S.C. § 1441(d) (1976). See *supra* note 24.

<sup>112</sup> Comment, *supra* note 12, at 1059.

addition, the Act provides significant statutory incentives to encourage suits against foreign sovereigns to be decided in federal courts by specifically eliminating the minimum amount in controversy requirement<sup>113</sup> and the plaintiff's right to a jury trial.<sup>114</sup> While the Supreme Court noted in *Verlinden* that "Congress did not prohibit [state alien-foreign sovereign] actions when it enacted the Foreign Sovereign Immunities Act . . .,"<sup>115</sup> the incentives inherent in the availability of federal jurisdiction should prompt the parties to restrict themselves in practice to federal courts, contributing further to uniformity in immunities law.

More worrisome implications of permitting alien plaintiffs to sue in United States courts are caused by the prospect of international forum shopping. The clarity of the language of the Foreign Sovereign Immunities Act gave the *Verlinden* court little choice but to find that Congress had authorized federal jurisdiction over alien-foreign sovereign suits.<sup>116</sup> The potential policy ramifications of extraterritorial assertions of American jurisdiction, however, deserve review from both Congress and future courts presiding over alien-foreign sovereign disputes.

Critics of United States assertions of jurisdiction over alien-foreign sovereign suits essentially make two arguments. The first is that American courts will be flooded with suits by aliens seeking a jurisdiction more receptive to their claims. The motive to file in American courts would seem to be clear, with foreign commentators noting that, "As a moth is drawn to the light, so is a litigant drawn to the United States."<sup>117</sup> It has been argued, however, that the Supreme Court's decision to open the federal courts to alien-foreign sovereign suits will not significantly increase the number of cases over the number filed before *Verlinden*, when aliens simply asserted their claims against foreign sovereigns in American state courts.<sup>118</sup> Furthermore, the requirement that the defendant foreign sovereign have minimum contacts in the United States, and the possibility of immunity, provide additional checks against frivolous alien claims

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<sup>113</sup> 28 U.S.C. § 1330(a).

<sup>114</sup> *Id.* Eliminating the right to a jury trial is one of the most important incentives to removal to federal courts. MOORE'S FEDERAL PRACTICE, *supra* note 20, ¶ 0.66[4] nn.12-14 and accompanying text. The provision eliminating jury trials has been upheld as constitutional, *see Williams v. Shipping Corp. of India*, 653 F.2d 875 (4th Cir. 1981), although the Act has been interpreted as not extending its prohibition on jury trials to diversity cases. Comment, *supra* note 18, at 1049-50 n.73.

It has also been suggested that the due process requirements are easier to meet in federal courts than in state courts, as jurisdiction can be satisfied by minimum contacts anywhere in the United States rather than merely in the forum state. Note, *Jurisdiction Over Domestic and Alien Defendants*, 69 VA. L. REV. 85, 122 (1983).

<sup>115</sup> *Verlinden*, 103 S. Ct. at 1970 n.16.

<sup>116</sup> *See supra* notes 19-24 and accompanying text.

<sup>117</sup> Grossfield & Rogers, *A Shared Values Approach to Jurisdictional Conflicts in International Economic Law*, 32 INT'L & COMP. L.Q. 931, 932 (1983). Factors listed as encouraging litigation in the United States are America's contingency fee system, its general view that losing plaintiffs do not pay defendants' costs, and the propensity to award higher damages than foreign courts.

<sup>118</sup> *See Recent Development*, *supra* note 24, at 286-87.



crowding American courts.<sup>119</sup> The significance of *Verlinden* as the first Supreme Court case to officially condone American jurisdiction over alien-foreign sovereign suits should not be overlooked, however. It is reasonable to believe that aliens, conclusively told by *Verlinden* that their suits against foreign sovereigns will not be rejected automatically by United States courts, will likely bring more suits in America, although admittedly the extent of the increase in volume is somewhat uncertain.<sup>120</sup>

A second negative implication of permitting alien plaintiffs to choose to sue in United States courts is the negative effect American assertions of jurisdiction will have on foreign sovereigns, which will no doubt view in political terms what Congress believed were the objective, legally-based decisions of American courts.<sup>121</sup> Negative reactions can be expected, as United States assertion of jurisdiction over alien-foreign sovereign suits "would deviate from current international practice"<sup>122</sup> and would probably include suits not justiciable in the sovereigns' own courts.<sup>123</sup> Foreign sovereigns may well retaliate by trading in the future through banks not subject to United States jurisdiction,<sup>124</sup> by imposing unreasonable jurisdiction over American companies with less than minimum contacts in their country, or by enacting blocking statutes.<sup>125</sup> Such reactions by foreign sovereigns would be contrary to the congressional goal in enacting the Foreign Sovereign Immunities Act of bringing about greater harmony between the United States and foreign sovereigns.<sup>126</sup>

The concern over other countries' reactions to American assertions of jurisdiction is a legitimate one, but negative reactions also arise from the article III diversity clause's authorization of American jurisdiction over suits against foreign sovereigns by United States citizens. The difference between diversity cases and alien-foreign sovereign cases, however, is that in the former, the American interest in protecting its own citizens is believed to outweigh the possible negative consequences of extraterritorial assertions of jurisdiction.<sup>127</sup> American interest in providing a forum in the latter situation is less clear-cut, and one commentator has

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<sup>119</sup> Note, *supra* note 19, at 1865. Although the due process protections are probably not constitutionally conferred on aliens, Note, *supra* note 12, at 481, minimum contacts are mandated by the Act. *Id.*

<sup>120</sup> Even small increases in the number of suits may have a significant impact, as most of these cases are quite complex and involve large amounts of money. Note, *supra* note 19, at 1861 n.6.

<sup>121</sup> Grossfield & Rogers, *supra* note 117, at 932 (foreign countries understand the American values involved but "resent the exportation . . . of American enforcement through private attorneys general"). See also Comment, *supra* note 18, at 1040 n.10 (Nigeria initially refused to file a brief with the Supreme Court in *Verlinden*); Note, *supra* note 19, at 1874 n.97 (listing examples of foreign hostility to American extraterritorial assertions of jurisdiction).

<sup>122</sup> Note, *supra* note 12, at 483.

<sup>123</sup> Note, *supra* note 19, at 1874.

<sup>124</sup> Recent Development, *supra* note 24, at 289.

<sup>125</sup> Note, *supra* note 12, at 485.

<sup>126</sup> Recent Development, *supra* note 24, at 285 n.31.

<sup>127</sup> Note, *supra* note 12, at 485-86.

even suggested that Congress rewrite the Foreign Sovereign Immunities Act to specifically exclude alien-foreign sovereign suits from American federal or state jurisdiction.<sup>128</sup>

This suggested approach appears unduly restrictive, however. The proposal downplays the significant benefits possible through American jurisdiction over alien-foreign sovereign suits. Applying United States law extraterritorially could protect foreign subsidiaries of American companies<sup>129</sup> or other American investments in foreign corporations which might lack a remedy elsewhere.<sup>130</sup> Exercising American jurisdiction in such cases might also encourage creditors to utilize American banks or to increase their volume of trade by dealing with different foreign sovereigns and their instrumentalities.<sup>131</sup> It has also been suggested that American courts could better "protect individuals against repressive" regimes whose policies conflict with our notions of basic fairness and human rights.<sup>132</sup>

Just as significant are the checks provided which should limit, to some extent, the volume of alien suits in American courts. The Foreign Sovereign Immunities Act authorizes only suits against foreign sovereigns, not against all aliens, in American courts.<sup>133</sup> Some of those sovereigns will be entitled to immunity, and of those which are not, some will lack the contacts necessary to cause the "direct effect" in the United States necessary for personal jurisdiction.<sup>134</sup>

Neither the immunity waiver nor the minimum contacts of a foreign sovereign are terribly difficult to prove, however, thus providing little protection against the fears of court flooding and foreign sovereign animosity. The crucial check, then, is provided in the modified forum non

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<sup>128</sup> *Id.* at 486. In addition to the policy arguments discussed *infra* notes 129-32 and accompanying text, eliminating United States "arising under" jurisdiction over alien-foreign sovereign suits may be unworkable. The brief period following the Second Circuit's *Verlinden* declaration that such jurisdiction was unconstitutional saw the development of several alternate theories of jurisdiction intended to circumvent the decision's mandates. See Comment, *supra* note 18, at 1067-69 (development of "minimal" diversity theory and assignment of claims to American citizens). These theories would be available to similarly circumvent a statutory ban.

<sup>129</sup> Comment, *supra* note 18, at 1067.

<sup>130</sup> Note, *supra* note 7, at 917-18. Such a situation occurred in *J. Zeevi & Sons v. Grindlays Bank*, 37 N.Y.2d 220, 333 N.E.2d 168, 371 N.Y.S.2d 892, *cert. denied*, 423 U.S. 866 (1975), in which Uganda admitted severing its irrevocable letter of credit to an Israeli partnership established in a United States bank. Because Uganda broke diplomatically and cancelled all letters of credit in favor of Israel, no cause of action remained in Uganda or Israel. Uganda's failure to agree to subject itself to an international arbiter rendered alternative forums questionable. The New York Court of Appeals thus accepted jurisdiction and granted plaintiff summary judgment.

<sup>131</sup> Clarke, *supra* note 63, at 232 (greater certainty of legal rights will encourage investment).

<sup>132</sup> Note, *supra* note 19, at 1870-71. While extraterritorial application of controversial United States policies may initially lead to resentment and retaliation by affected foreign sovereigns, at least one commentator has noted that "it could serve as a starting point for negotiation on an international agreement" on the law of sovereign immunity. Clarke, *supra* note 63, at 233.

<sup>133</sup> See *supra* note 99.

<sup>134</sup> See *supra* note 119.

conveniens theory adopted by the Supreme Court in *Verlinden*.<sup>135</sup>

The modified theory suggests adding additional considerations in alien foreign sovereign suits to the the traditional forum non conveniens analysis. Courts applying the new rule should examine five areas in making their determinations: (1) Whether an alternative forum is available,<sup>136</sup> (2) Whether the cost and convenience of litigating in American courts is unduly burdensome on the parties,<sup>137</sup> (3) Whether United States jurisdiction will strain American foreign relations with the defendant foreign state,<sup>138</sup> (4) Whether American courts are sufficiently competent to apply the law which governs the case,<sup>139</sup> and (5) whether the foreign courts are conducted in a sufficiently fair manner.<sup>140</sup> The Supreme Court's acceptance of the modified forum non conveniens rule opens the door for its aggressive application by American district courts, and dismissal of *Verlinden* may well be appropriate on forum non conveniens grounds even if Nigeria's Central Bank lacks immunity.<sup>141</sup> It is to be hoped that the forum non conveniens theory will be further modified to allow for its aggressive application by appellate courts as well, in order to promote uniformity and to limit the number of unnecessary and politically harmful suits between foreigners brought in American courts.<sup>142</sup>

Although clarification by Congress of its intent regarding American

<sup>135</sup> *Verlinden*, 103 S. Ct. at 1970 n.15.

<sup>136</sup> Note, *supra* note 19, at 1875. Generally dismissals would not be granted unless jurisdiction in another forum was available or the parties consented to such jurisdiction, *see supra* note 130, although exceptions would be made where the negative foreign policy implications of American adjudication outweighed unfairness to the plaintiff of dismissal. Note, *supra* note 19, at 1875.

<sup>137</sup> *Id.* This portion of the analysis is part of traditional forum non conveniens evaluation.

<sup>138</sup> *Id.* at 1876. Court examination of negative foreign policy repercussions at first blush appears contrary to the the congressional desire in enacting the Foreign Sovereign Immunities Act to base immunity questions on legal rather than political considerations. *See supra* note 80 and accompanying text. However, the congressional desire was designed primarily to limit the inequitable effects which administrations' case-by-case determinations caused on different parties. Court examination of the political repercussions of granting or denying sovereign immunity is not only consistent with legal analysis, but necessary to informed decisionmaking. The key difference after the Act is that courts, unlike the State Department, are disinterested with respect to foreign policy and are more likely to objectively weigh individual rights against that policy. The development of a consistent rule of application of forum non conveniens is not inconsistent with the congressional goals behind the Act.

<sup>139</sup> Note, *supra* note 19, at 1876-77. This section is part of the choice of law examination used in traditional forum non conveniens analysis.

<sup>140</sup> *Id.* at 1877. The author of the modified theory notes that courts should "not presume" unfairness by foreign courts, implying that the mere possibility of a different outcome is insufficient grounds to deny dismissal based on forum non conveniens.

<sup>141</sup> *See* Note, *supra* note 12, at 481-83 (alternate forum in *Verlinden* is available; dismissal is justified).

<sup>142</sup> The author of the modified forum non conveniens theory suggests that "[a]ppellate courts should be deferential in reviewing applications of this rule by trial courts," just as they are deferential under applications of traditional forum non conveniens. Note, *supra* note 19, at 1875 n.100. The importance of this doctrine as the preeminent check on undesirable alien-foreign sovereign suits in American courts, however, would seem to demand freer review by appellate courts.

jurisdiction over alien-foreign sovereign suits may still be desirable,<sup>143</sup> the modified forum non conveniens theory provides a workable balance in the interim. In sum, international forum shopping may offer significant benefits if the possible negative foreign policy repercussions are considered and checked when necessary.

In *Verlinden B.V. v. Central Bank of Nigeria*, the United States Supreme Court decided that the Foreign Sovereign Immunities Act constitutionally grants federal courts jurisdiction to decide the sovereign immunities issue in suits between aliens and foreign sovereigns. The decision marks a reaffirmation of the broad interpretations of the "arising under" clause of article III. *Verlinden* also supports the congressional desire to encourage sovereign immunity decisionmaking in federal courts, which eventually should become the exclusive arbiters in United States court disputes between aliens and foreign sovereigns. Any potential negative foreign policy implications of American jurisdiction over these disputes should be checked through an aggressive modified policy of forum non conveniens.

—GREGORY STUART SMITH

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<sup>143</sup> Case Digest, *supra* note 35, at 533-34 (requesting congressional clarification).

